IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 928

JOSEPH B. CRAWFORD, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for A Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION, *AMICUS CURIAE*

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The National Education Association (NEA) respectfully submits this brief, as *amicus curiae,* in support of the Petition for Certiorari in this case. Both the Petitioners and the Solicitor General have consented to the filing of this brief.

STATEMENT OF THE INTEREST OF THE NEA

The National Education Association is a non-profit educational and charitable corporation chartered by an Act of Congress in 1906. Its principal purpose, as described in its charter, is to "elevate the character and advance the interests of the profession of teaching and to promote the cause of education in the United States." Its membership consists of more than one million educators, at all levels, including both teachers and school administrators. Most of the teachers who are or have been employed in the overseas dependents schools operated by the Department of Defense are members of an NEA affiliate, known as the Overseas Education Association (OEA).

The NEA has long been concerned with the problem which is now, finally, coming before the Court in this case. In 1957, NEA conducted a survey of its members employed in overseas schools, which revealed that they were greatly dissatisfied with their terms and conditions of employment. The results of this survey were brought to the attention of the Congress by the NEA in testimony presented before the House Committee on Appropriations in 1958. *Hearings on Defense Appropriations before a Subcommittee of the House Committee on Appropriations,* 85th Cong., 2d Sess. pp. 536-46 (1958). It was largely as a result of this testimony, as well as similar testimony presented by the Department of Defense (*id.* at 519), that Congress enacted reform legislation in 1959. That reform legislation, of course, was the Department of Defense Overseas Teachers Pay and Personnel Practices Act, under which the present case arises.

The NEA actively supported the 1959 Act, as did its affiliate, the OEA. After this legislation had been

adopted, representatives of NEA and OEA consulted with the appropriate officials of the Government concerning its implementation. (See Exhibit C to Def. Opp. to Mot. for Summary Judgment, p. 6).

Certainly neither the NEA nor the OEA would have supported the legislation if it had ever been anticipated that the statute would be utilized to intensify, rather than to remedy, the inequitable position of overseas teachers. The whole purpose of the legislation was to bring the terms and conditions of employment of overseas teachers in line with those prevailing in the United States.

When it became apparent that the Secretary of Defense was failing to administer the Act in a manner which would put the salaries of overseas teachers in parity with those in the United States, the NEA and the OEA strongly protested. When these protests were disregarded, these organizations joined with a group of individual teachers in an action brought in the United States District Court for the District of Columbia to compel the Secretary of Defense to set rates of compensation for overseas teachers at levels comparable to those in the United States, as the statute clearly required. This action was dismissed for lack of jurisdiction, and the dismissal was affirmed on appeal. *Mitchell* v. *McNamara,* 122 U.S. App. D.C. 224, 352 F. 2d 700 (D.C. Cir. 1965)

The NEA's continuing interest in this matter is not based merely on the fact that the rights of approximately 20,000 of its members are involved. The overseas schools of the Department of Defense constitute one of the largest of this country's school systems. The quality of that school system, of course, depends

ultimately on the quality of its teachers. And the ability of the Government to recruit qualified teachers will depend upon whether teachers believe that, if they accept such employment, they will receive fair treatment and adequate pay. The public interest in maintaining an able and continuing corps of teachers for the overseas school systems thus requires that the non-compliance with and maladministration of the 1959 Act be reviewed and rectified by this Court.

ARGUMENT

The NEA respectfully urges the Court to grant the Petition for Certiorari in this case.

The issue before the Court, while growing out of a specific statute and its non-implementation, is a continuing one with important and long-range prospective implications, notwithstanding the enactment of other legislation in 1966. This case clearly raises the question of the legal obligation of a federal officer or agency *to attempt to comply* with applicable statutes. The statute here directed that the DoD "shall" fix salaries "in relation to the rates of basic compensation for similar positions in the United States . . ." Defendant's basic claim is that Congress failed to appropriate funds to meet this statutory standard, but that is not the real issue on the facts of this case. The prospective importance of this case is that it encompasses a failure or refusal of DoD even to request sufficient appropriations with which to comply with statutory obligations. Only in the first year after enactment of Public Law 86-91 did DoD even attempt to obtain adequate funds to meet the statutory level. Thereafter, by self-admission, DoD consistently failed and refused to request sufficient appropriations or to apply for supplemental

appropriations that would comply with the mandatory statutory standard (Defendant's Statement of Facts, par. 16(b)). Thus we have here a consistent pattern of deliberate and constant refusal to take the necessary ministerial steps to implement a mandatory statutory standard.

The decision below, by approving such culpable administrative action, gives legal sanction to what is both a negation of clear legislative intent and a breach of faith to a group intended to be protected by the statute. A contrary decision of this Court can prevent such subversion of other statutes applicable to plaintiff teachers (or to others). It is the method of alleged compliance with statutory obligations which is at stake here. Unless this Court rules otherwise, the decision of the Court below enshrines into precedent for all administrative agencies in numberless types of instances the means for evading statutory standards and mandates as well as an excuse for improperly laying to Congress a maladministration of law by administrative agencies. In these circumstances, this case clearly warrants review by this Court under Rule 19.

The Secretary of Defense, by ignoring his obligation to request adequate funds pursuant to law, in effect subsidized the operation of the overseas schools out of the salaries of the teachers. The net effect was to deny to teachers the salaries to which they were plainly entitled. Whatever rationalization is now advanced in defense of the Secretary's action, it cannot conceal the fact that the law provided one thing and the Secretary did another. It is impossible to reconcile the obligation to set teachers salaries "in relation to" stateside salaries and the Secretary's decision to set

them "in relation to" the per pupil limitation. This administrative decision was merely a formula to justify the Secretary's failure to request appropriations to the level mandated by statute, a clear and unequivocal violation of law.

This is not the time to argue the merits of the question in detail, since we support fully the arguments already before the Court in the Petition for Certiorari. We wish merely to inform the Court that the NEA, which was one of the original supporters of the 1959 Act, strongly believes that if the decision of the Court below is permitted to go unreviewed, teachers now employed overseas will be discouraged from remaining in Government service, and other teachers will be discouraged from accepting positions in it. The public interest in a stable and effective overseas education system will be severely impaired. In addition, a "pat" device for non-compliance with statutory mandates will be sanctioned and become applicable to other situations affecting plaintiff teachers as well as others.

It is noteworthy that the Government's opposition to certiorari in this case is based mainly on the argument that the decision below is correct. In these circumstances, a denial of certiorari will necessarily be construed as tacit approval of the manner in which the Secretary administered the Act. Since budgetary problems are always present in the Government, the refusal of the Court to review the decision in this case will encourage the Department of Defense, as well as other agencies, to take similar unlawful action in the future to solve a budgetary dilemma, by ignoring statutory mandates. Inadequate appropriations are a continuing problem in the administration of the ex-

ecutive departments and the threat continues to exist that the Secretary of Defense would once again seek to "adjust" the salaries of overseas teachers to meet budgetary exigencies. The 1966 amendments to the Act are no insurance against similar arbitrary action in the future, since presumably it could be argued that all the Secretary need do under the decision below is to refuse or fail to request appropriations pursuant to statutory requirement. The Secretary ignored the clear meaning and purpose of the 1959 legislation and he could as easily do the same under the new law. The issue of whether overseas teachers *must* be treated as the law provides continues to abide. So does the issue whether the Secretary must seek or attempt to comply with the law.

This festering problem can be promptly and finally resolved only by this Court. Accordingly, the NEA respectfully urges that the Petition for Certiorari be granted.

Respectfully submitted,

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